IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No 162 of 1988

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.SHAH
and
Hon'ble MR.JUSTICE D.A.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the Civil Judge? : NO

COMMISSIONER OF INCOME TAX

Versus

VINODCHANDRA D ASARWALA,

Appearance:
MR AKIL KURESHI for Petitioner No. 1
SERVED BY RPAD - (N) for Respondent No. 1

CORAM : MR.JUSTICE M.S.SHAH
and
MR.JUSTICE D.A.MEHTA

Date of decision: 17/10/2001

ORAL JUDGEMENT

(Per : MR.JUSTICE D.A.MEHTA)

The Income Tax Appellate Tribunal, Ahmedabad Bench 'C' has referred the following question for the

opinion of this Court, at the instance of the revenue :

"Whether on the facts and in the circumstances of the case and in law, the Tribunal was right in coming to the conclusion that capital gain should be bifurcated on the basis of total consideration of sale between land and building and that in respect of land the same may be treated as long term capital gain?"

2. The assessment year under consideration is 1979-80 and the relevant accounting period for the said assessment year is S.Y.2034. The assessee, individual, purchased a plot of land bearing No.2 in Survey No.97 at Umarwada on 21st December, 1973 at a cost of Rs.17,999/-. Thereafter, he constructed a building thereupon and on completion of building in March, 1977, total cost of building was Rs.1,11,307/-. The building along with the plot of land was sold on 5th January, 1978 for a sum of Rs.1,95,000/-. In the return of income filed for the assessment year under consideration, the assessee declared long-term capital gain of Rs.51,299/- and claimed exemption under Section 54-E of the Income Tax Act,1961 (the Act) as well as deduction 80-T of the Act.

3. The Income-tax Officer came to the conclusion that the transaction resulted in short-term capital gain as the assessee could not have transferred the building independently of the land itself and the building which was completed in March, 1977 was sold after about 9 months, and hence, the assessee's claim for treating the transaction as long-term capital gain was rejected.

4. In appeal before the Appellate Assistant Commissioner, it was pointed out on behalf of the assessee that in the sale deed itself cost of the land and building were separately shown and, therefore, the capital gain arising from transfer of the land and building had to be bifurcated accordingly. The A.A.C. accepted the plea of the assessee and noted that in the sale deed, the narration was that the plot of land purchased for Rs.17,999/- had been sold for Rs.42,000/and, therefore, according to him, transfer of land resulted in long-term capital gain to the tune of Rs.24,000/-. The A.A.C., therefore, held that the assessee would be entitled to exemption under Section 54-E of the Act and deduction under Section 80-T of the Act from this figure of Rs.24,000/- which was long-term capital gain. The Tribunal, in revenue's appeal, confirmed the order of the A.A.C.

5. We have heard Mr.Akil Kureshi, learned Counsel appearing on behalf of the applicant-revenue. Though served, none appears on behalf the respondent-assessee.

6. It was submitted by Mr.Kureshi that the assessing officer was justified in treating the transaction as short-term capital gain in light of the fact that, it was not possible to bifurcate the superstructure from the land as the transaction was a composite one. It was also contended that the assessee could not have entered into a sale transaction of either the land or the building without transferring the other.

7. Section 2(14) defines "capital asset" while Section 2(42A) defines "short-term capital asset". The relevant extracts of the said provisions as are material for our purpose read as under :

> "(14) "capital asset" means property of any kind held by an assessee, whether or not connected with his business or profession, but does not include- "
>
> "(42A) "short-term capital asset" means a capital asset held by an assessee for not more than [thirty-six months] immediately preceding the date of its transfer."

Thus, it can be seen that property of any kind held by an assessee shall fall within the meaning of "capital asset" for the purpose of the Act. Admittedly, in the present case, both the plot of land as well as the building constructed on the said plot fulfill the description of property so as to fall within the meaning of definition of "capital asset". It cannot be disputed that both the land and the building are capital assets which are independent of each other. Each of the said properties, namely, the plot of land and the building are identifiable as separate capital assets on their own and it is not possible to state that they cannot be treated as capital assets as distinct from each other.

7.1 The plot of land was admittedly held for a period of more than 36 months, that means, it was not a short-term capital asset as per definition given in Section 2(42A). Section 45 of the Act gives rise taxable event, namely, "capital gains" when a capital asset is transferred in the previous year. In the present case, the assessee transferred two distinct assets, namely, land and building, and from the facts available on record, it is possible to ascertain the applicability or

otherwise of the provision of Section 2(42A) of the Act; the plot of land having been held for a period of more than 36 months does not fall within the meaning of short-term capital asset as defined, while the building having been held for a period of less than 36 months stands governed by the definition of short-term capital asset. In view of this situation, it is possible to bifurcate the capital gains arising with reference to the sale of the land and the building even when they are sold under a common sale deed as one unit. Infact, as recorded by the Appellate authority and confirmed by the Tribunal, the narration in the sale document specifically refers to the cost of land separately. In view of these circumstances, it cannot be stated, as contended by the revenue, that the land did not remain an independent and an identifiable capital asset and that the transaction had to be treated as a composite transaction resulting in short-term capital gains. The land on which the building was constructed was a long-term capital asset and by putting up the construction, the land did not cease to be so. Therefore, both the first appellate authority and the Tribunal were right in law when they held that the capital gains arising with reference to the sale in question should be bifurcated asset-wise into long-term capital gains or short-term capital gains as per the period of holding of each asset.

7.2 Similar view has been expressed by the Rajasthan High Court in the case of C.I.T. V/s Vimal Chand Golecha [1993] 201 ITR 442, by the Madras High Court in case of C.I.T. V/s. Dr.D.L.Ramachandra Rao [1999] 236 ITR 51 and by the Karnataka High Court in the case of C.I.T. V/s. C.R.Subramanian 242 ITR 342. We are in respectful agreement with the said decisions.

8. For the aforesaid reasons, we hold that there is no infirmity in the order of the Tribunal when it came to the conclusion that the capital gain could be bifurcated on the basis of total consideration of sale between land and building and that in respect of land the same should be treated as long-term capital gain.

The question referred to us is, therefore, answered in the affirmative i.e. in favour of the assessee and against the revenue.

The reference stands disposed of accordingly with no order as to costs.

(M.S.Shah, J) (D.A.Mehta, J)

'Bhavesh'